

## Message Text

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SUBJECT: INSTRUCTIONS FOR U.S. DELEGATION TO UNCITRAL  
WORKING GROUP MEETING ON FORMATION OF CONTRACTS

1. THE POSITION OF THE USDEL SHOULD BE TO SUPPORT DRAFTING OF UNIFORM RULES ON THE FORMATION OF CONTRACTS FOR INTERNATIONAL SALE OF GOODS. IN THIS CONNECTION, THE DELEGATION SHOULD ENCOURAGE EFFORTS BY THE WORKING GROUP TO PRODUCE A DRAFT CONVENTION ON A SCHEDULE THAT WILL PERMIT THE CONVENTION TO BE CONSIDERED AT THE SAME DIPLOMATIC CONFERENCE WHICH WILL TAKE UP THE DRAFT CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG). THERE ARE SEVERAL CONSIDERATIONS WHICH FAVOR THIS COURSE. THERE SHOULD BE A CONGRUENCE BETWEEN THE TWO DRAFTS IN A NUMBER OF AREAS, SUCH AS DEFINITIONS, AND DEALING WITH BOTH AT THE SAME MEETING WILL ENSURE ACHIEVEMENT OF THIS GOAL. IN ADDITION, THERE SHOULD BE CONSIDERABLE SAVINGS IN TIME AND MONEY IF BOTH

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DRAFT CONVENTIONS ARE CONSIDERED AT THE SAME CONFERENCE.

2. DEPARTMENT UNDERSTANDS PROPOSALS MAY BE MADE TO HOLD A SECOND WORKING GROUP MEETING IN AUTUMN OF 1977 ON BASIS THAT PRESENT MEETING WOULD SEEK TO REACH AGREEMENT ON EXTENT AND NATURE OF REVISIONS REQUIRED IN 1964 UNIFORM LAW ON FORMATION. DRAFT AGREEMENT INCORPORATING THESE

CHANGES WOULD THEN BE ADOPTED AT FALL WORKING GROUP. IN LIGHT OF CONSIDERATIONS DISCUSSED IN PRECEDING PARAGRAPH DELEGATION IS AUTHORIZED TO SUPPORT SUCH A SCHEDULE.

3. DELEGATION SHOULD ALSO SUPPORT SUGGESTION CONTAINED IN PARAGRAPH 17 OF WORKING GROUP PAPER NO. 26 TO EFFECT THAT DRAFT CONVENTION BE LARGELY LIMITED TO DEALING WITH OFFER AND ACCEPTANCE. PROBLEMS ARISING IN THIS AREA ARE THE ONES WHICH CONSTANTLY OCCASION DIFFICULTIES IN INTERNATIONAL TRANSACTIONS, AS A CONSEQUENCE OF THE DIFFERENCES IN VARIOUS LEGAL SYSTEMS. DELEGATION SHOULD ALSO SUPPORT THE SUGGESTION IN PARAGRAPH 18 OF WORKING PAPER 26 THAT PROVISIONS IN RESPECT OF VALIDITY OF INTERNATIONAL SALES CONTRACTS SHOULD NOT BE TAKEN UP AT THE PRESENT TIME, IN VIEW OF INFREQUENCY WITH WHICH THESE MATTERS ARISE IN CONNECTION WITH SUCH CONTRACTS, AND THE LIKELIHOOD THAT ATTEMPT TO DEAL WITH MATTERS RELATING TO VALIDITY WOULD REQUIRE SEVERAL YEARS TO WORK OUT.

4. WORKING PAPER 26 CONTAINS A SUBSTANTIAL NUMBER OF PROPOSED ALTERATIONS TO THE 1964 UNIFORM LAW ON FORMATION OF INTERNATIONAL SALES CONTRACTS. IN GENERAL THE DELEGATION SHOULD BE GUIDED BY THE PRINCIPLE THAT ALTERATIONS IN THE 1964 TEXT SHOULD BE SUPPORTED IF THEY ARE IMPROVEMENTS IN THAT TEXT WHETHER THE CHANGE PROPOSED IS A SUBSTANTIVE ONE OR MERELY A LANGUAGE CHANGE TO ELIMINATE AMBIGUITY OR CLARIFY AN OBSCURITY. HOWEVER, DELEGATION SHOULD EXAMINE EACH PROPOSED MODIFICATION CAREFULLY, ESPECIALLY IN LIGHT OF COMMENTS OFFERED BY REPRESENTATIVES

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OF OTHER LEGAL SYSTEM, IN ORDER TO BE CERTAIN THAT PROPOSED CHANGES ARE ACTUALLY IMPROVEMENTS. DELEGATION SHOULD TAKE INTO ACCOUNT PROBLEMS SUCH AS THE FOLLOWING:

A. IN PROPOSED ARTICLE 3 (A), PARAGRAPH 1, IS THE REQUIREMENT THAT THE AGREEMENT BE MADE IN GOOD FAITH A NECESSARY ADDITION? THERE IS NO REQUIREMENT THAT THE BASIC CONTRACT BE MADE IN GOOD FAITH AND APPARENTLY THIS IS ASSUMED. DOES SPECIFIC REFERENCE TO GOOD FAITH RAISE VALIDITY ISSUES IN LIGHT OF PARAGRAPH 3 ABOVE?

B. THE PROVISIONS OF PARAGRAPH 3 OF ALTERNATIVE ARTICLE 6, REGARDING THE NEED TO NOTIFY WITHIN A REASONABLE TIME OF ACCEPTANCE BY AN ACT SUCH AS SHIPMENT OF THE GOODS OR PAYMENT OF THE PRICE, MAY REQUIRE FURTHER STUDY IN CONNECTION WITH THE PROVISIONS OF ALTERNATIVE ARTICLE 10 REGARDING REVOCATION OF AN ACCEPTANCE.

C. ALTERNATIVE ARTICLE 7, PARAGRAPH 2 (B), PROVIDES

THAT EVEN THOUGH PRINTED TERMS OF A REPLY MAY MATERIALLY  
ALTER PRINTED TERMS OF AN OFFER, THE REPLY CONSTITUTES

AN ACCEPTANCE OF THE OFFER IF THE NON-PRINTED TERMS OF THE  
REPLY DO NOT MATERIALLY ALTER THE TERMS OF THE OFFER.  
WHILE THE RULE IS MADE SUBJECT TO A REQUIREMENT THAT  
THERE IS NO ACCEPTANCE IF THE OFFEROR OBJECTS TO THE  
DISCREPANCY WITHOUT DELAY, THE PROPOSED RULES WOULD SEEM  
TO OPEN UP A CONSIDERABLE AREA OF UNCERTAINTY AND CON-  
FUSION. THERE IS A CONSIDERABLE BODY OF OPINION THAT  
WOULD CONSIDER THAT PURPORTED ACCEPTANCE WOULD BE REALLY  
A COUNTEROFFER, AND IT MAY BE DOUBTED THAT THE PROPOSAL  
WILL BE GENERALLY ACCEPTABLE IN INTERNATIONAL TRADE.

D. PROPOSED ARTICLE 11 (A) TAKES UP THE QUESTION OF  
THE ASSIGNMENT OF OFFERS AND WHAT ARE THE CONSEQUENCES  
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OF THE ACCEPTANCE OF AN OFFER BY AN ASSIGNEE. THE SUB-  
JECT OF ASSIGNMENTS IS NOT DEALT WITH IN THE CISG. IT  
IS DOUBTFUL THAT IT IS NECESSARY TO TAKE UP THIS PROBLEM  
IN DEALING WITH FORMATION OF CONTRACTS.

5. WITH RESPECT TO THE TWO ALTERNATIVE TEXTS PROPOSED  
AS SUBSTITUTES FOR ARTICLE 11 OF THE 1964 UNIFORM LAW,  
ALTERNATIVE 2 APPEARS TO BE THE PREFERABLE RULE AS IT  
COVERS A WIDER RANGE OF POSSIBILITIES, ALL OF WHICH ARE  
LIKELY TO ARISE SUBSEQUENT TO THE MAKING OF AN OFFER.  
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